

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-3298

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE MATTER OF THE ESTATE OF DUANE E. SMITH,
DECEASED:**

**SHARMAN M. SMITH, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
DUANE E. SMITH,**

APPELLANT,

V.

GYPSUM SUPPLY COMPANY,

RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
GERALD C. NICHOL, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Sharman Smith, personal representative of the estate of Duane Smith, appeals from a summary judgment in favor of Gypsum

Supply Company.¹ Smith objected to Gypsum's claim against the estate and moved for summary judgment. The trial court denied the motion and granted judgment for Gypsum, even though it never moved for summary judgment. On appeal Smith challenges both rulings. We affirm the decision to deny summary judgment to Smith, but reverse the judgment in favor of Gypsum.

The facts presented on summary judgment are not in dispute. Sharman Smith filed an application for informal probate on July 6, 1994, after her husband, Duane Smith, died in June 1994. The deputy probate registrar entered an order setting October 6, 1994, as the deadline for filing all claims by creditors. The order further provided that Smith publish the order once per week for three consecutive weeks in the *Wisconsin State Journal* to notify creditors. On July 11, 18, and 25, 1994, the *Wisconsin State Journal* published the order. By letter dated August 1, 1994, Smith informed Gypsum of her husband's death and her status as his personal representative. She also acknowledged that he was indebted to Gypsum at the time of his death and that, as personal representative, it was her duty to satisfy that debt.

Gypsum did not file its claim until March 16, 1995. Consequently, Smith objected to the claim and moved for summary judgment on grounds that the claim was barred under § 859.02(1), STATS., because Gypsum failed to meet the October 6, 1994, deadline. The trial court denied the motion, holding on undisputed facts that the deadline did not apply to Gypsum's claim. Without further analysis, the trial court granted judgment for Gypsum in the amount of its

¹ We note that this case was originally assigned to Judge George A.W. Northrup, who granted an order for summary judgment. Judge Nichol, however, decided a subsequent motion for reconsideration and signed the final judgment.

claim, apparently assuming that no other issues remained to be litigated. On a motion for reconsideration, however, Smith presented an affidavit on a new issue, claiming that Gypsum also failed to comply with the filing requirement set forth in § 859.48(2)(b), STATS. The trial court denied reconsideration, and Smith appealed.

Section 859.01, STATS., enables a probate registrar to set a claim-filing deadline in informal probate proceedings. Section 859.02(1), STATS., provides that claims are barred unless filed by the date set under § 859.01. Section 859.02(2)(b) provides, however, that § 859.02(1) does not apply if the personal representative knew or should have known of a potential claim but failed to notify the potential claimant at least thirty days before the deadline, and the claimant did not know about the proceeding and the court in which it was pending. When the § 859.02(2)(b) criteria are met, a claim may be filed within one year of the decedent's death, if it is filed within thirty days of the earlier of these two events: (1) the date of notice; or (2) the date the claimant first learns of the proceeding and of the court in which it is being held. Section 859.48(2), STATS.

Summary judgment is appropriate if all material facts are undisputed, one reasonable inference is available from those facts, and that inference requires dismissal as a matter of law. *Wagner v. Dissing*, 141 Wis.2d 931, 939-40, 416 N.W.2d 655, 658 (Ct. App. 1987). We independently decide these issues without deference to the trial court. *Schaller v. Marine Nat'l Bank*, 131 Wis.2d 389, 394, 388 N.W.2d 645, 648 (Ct. App. 1986). A court may award summary judgment to a party even if that party has not moved for it. Section 802.08(6), STATS.

The undisputed facts show that Gypsum's claim was not barred under § 859.02(1), STATS. Smith knew about Gypsum's claim but her letter of August 1, 1994, did not give it notice of the filing deadline or of the court in which the estate proceeding was pending. Smith offered no evidence of other communications and gave no evidence that Gypsum had actual knowledge of the estate proceeding before October 6, 1994.

The trial court prematurely granted judgment for Gypsum. Smith raised only one issue in her motion for summary judgment: whether the October 6, 1994, filing deadline applied to Gypsum's claim. Consequently, the affidavits and other evidentiary submissions on summary judgment addressed only that issue. The trial court therefore erred by granting judgment for Gypsum before Smith had the opportunity to present evidence on other potential defenses, including timeliness of the claim under § 859.48(2), STATS. We are aware of no authority for the proposition that a party moving for summary judgment waives all claims or defenses not raised in the motion. We therefore remand for further proceedings on any other potential defenses Smith might have to Gypsum's claim and decline to award costs to either party.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

